FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-529

WES WISE, ET AL.,

Petitioners,

v.

ALBERT L. LIPSCOMB, ET AL.,

Respondents.

BRIEF FOR THE RESPONDENTS

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RESPONDENTS' BRIEF ON THE MERITS

TO THE HONORABLE JUDGES OF SAID COURT:

Respondents respectfully submit the following brief on the merits.

STATUTES, CHARTER, ORDINANCES AND RESOLUTIONS INVOLVED

In addition to the statutes, charter, ordinances and resolutions provided by petitioners, respondents would include the following:

Art. 1170, Tex. Civ. Stat. Ann. (1973)

When the governing body desires to submit amendments to any existing charter, said body may on its own motion, in the absence of a petition, and shall, upon receiving a petition signed by qualified voters in such city, town or political subdivision in number of not less than five per cent (5%) thereof or 20,000 signatures, whichever is less, submit any proposed amendment or amendments to such charter. The ordinance providing for the submission of such amendment or amendments shall require the submission thereof at an election to be held not less than thirty (30) days nor more than ninety (90) days after the passage of said ordinance. If the next regular municipal election is to be held during said period, the submission of said amendment or amendments shall be at such election. Otherwise, a special election shall be called for the purpose. Notice of the election for the submission of said amendment or amendments shall be given by publication thereof, in some newspaper of general circulation published in said city, on the same day in each of two (2) successive weeks; the date of the first publication to be not less than fourteen (14) days prior to the date set for said election. The form of such notice shall be as prescribed by the governing body or as may be otherwise prescribed by law, and shall include a substantial copy of the proposed amendment or amendments. Every amendment submitted must contain only one subject, and in preparing the ballot for such amendment, it shall be done in such manner that the voter may vote "Yes" or "No" on any amendment or amendments without voting "Yes" or "No" on all of said amendments. Each such proposed amendment, if approved by the majority of the qualified voters voting at said election, shall become a part of the charter of said city. No amendment shall be considered adopted

until an official order has been entered upon the records of said city by the governing body thereof declaring the same adopted.

STATEMENT OF THE CASE

The District Court found for respondents on the merits of their cause of action, holding that requiring all members of the City Council to run at-large unconstitutionally diluted the voting rights of the black citizens of the City of Dallas. The petitioners did not challenge this holding in the Court of Appeals and do not challenge it before this Court. At issue here is the selection of the appropriate remedy. (A. 170).

Respondents dispute the contention of petitioners that subsequent to the finding of the District Court that the existing at-large election system was unconstitutional that the City Council reapportioned itself, adopting the eight single-member, three at-large (eight/three) election system now challenged.

On January 17, 1977, after the lengthy hearing during which the petitioners vigorously defended the existing at-large election system, the District Court announced that it found such system unconstitutional and ordered the City Council to present a constitutional plan for the Court's consideration, permitting respondents to also offer proposed remedies. (A. 123). On January 23, 1975, the attorney for petitioners, pursuant to their instructions, submitted to the District Court a resolution stating the intention of a majority of the City Council to pass an ordinance to adopt the eight single-member, three at-large election system. Hearings were had on this plan presented

to the Court by the City Council, as well as two plans submitted by respondents. The two plans presented by respondents unquestionably provide greater representation for black voters than did the eight/three plan submitted by the petitioners. (R. Px. 108-111). At the conclusion of these hearings, the District Court ordered the plan implemented. Only then did the Council pass an ordinance purporting to change the election system. That ordinance begins with the assertion that it was passed "[a]s a result of the decision of the United States District Court for the Northern District of Texas in the case of Albert L. Lipscomb, et al. v. Wes Wise, et al., CA3-4571-E, and this ordinance enacted pursuant thereto..." (A. 189).

In fact, the City Council has no authority to change the election system. The election system is mandated by the Charter of the City of Dallas. (A. 150, 151). Amendments to the charter may be made only by a majority of the qualified voters voting at an election held for that purpose. Art. 1170, TEX. CIV. STAT. ANN. (1973). As the District Court itself held, "[i]f defendants had attempted to unilaterally change the voting plan, absent a vote of the people *or a ruling from the Court* with proper jurisdiction that a provision of the Dallas City Charter was constitutionally unfirm, they would have been acting unlawfully." (A. 151). (Emphasis supplied).

In the month of April, 1976, while this cause was on appeal to the Court of Appeals, the electorate approved a charter amendment adopting the disputed eight/three plan. This charter amendment was not submitted to the Attorney General for preclearance, nor was a declaratory judgment sought in the United States District Court for the District of Columbia, pursuant to the requirements of the voting Rights Act of 1965, as amended. 42 U.S.C. §1973(c).

Petitioners further neglect to mention that certain Mexican-American residents of the City of Dallas sought to intervene, alleging that Mexican-Americans as a class were denied effective participating in the political system of the City of Dallas because of the at-large election system. (A. 21-25). Because of immediacy of hearings on liability, this intervention was denied as to the hearing on the merits, although the District Court did permit the intervenors to participate in any hearing on remedy. (A. 26-28).

After the District Court ordered the eight/three plan and used the Mexican-American citizen as a special circumstance to justify the at-large features, the Mexican-American intervenors filed their Motion for Further Relief stating that the just concluded election in which the Mexican-American incumbent councilman was defeated by an incumbent Anglo councilman at-large contest demonstrated that at-large voting dilutes the vote of the Mexican-American citizen. The Court denied further relief. (A. 164-165).

The City Council did not appeal the District Court's finding that the old at-large election system was unconstitutional. Plaintiffs and intervenors, the Mexican-Americans, appealed, challenging the eight/three remedy ordered by the District Court. The Court of Appeals for the Fifth Circuit reversed and remanded the decision of the District Court, holding that the particular situation of Mexican-American citizens in Dallas did not constitute a special circumstance within the contemplation of *East Parish School Board v. Marshall*, 424 U.S. 636 (1976). (A. 168-177).

SUMMARY OF THE ARGUMENT

1. The District Court is bound by the rule of *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) requiring single-member districts absent unusual circumstances when a court orders reapportionment of an election system.

2. Mexican-American voters in this case cannot provide a justification for at-large seats. The District Court's finding that they would benefit from at-large elections is clearly erroneous.

3. The District Court's perceived need for a city-wide perspective on the City Council cannot justify the use of the at-large election system.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY HELD THAT THE AT-LARGE ASPECTS OF THE ELECTION PLAN ORDERED BY THE DISTRICT COURT VIOLATED THE FEDERAL COMMON LAW PREFERENCE FOR SINGLE-MEMBER DISTRICTS.

Respondents agree with the Court of Appeals that this dispute must be settled within the parameters of the rule last stated in *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976):

> We have frequently reaffirmed the rule that when United States District Courts are put to the task of fashioning reapportionment plans to supplant concededly invalid State legislation, single-member districts are to be preferred absent unusual circumstances. 424 U.S. at 639.

The petitioners contend the rule is not applicable, because the instant plan is "State-initiated," not court-ordered, and is therefore not subject to the federal common law of voting rights remedies. The threshold question becomes whether or not this is a court-ordered plan within the ambit of *East Carroll.*

Respondents have set forth in their Statement of the Case a chronology of the steps taken by the District Court in ordering the eight/three plan implemented. That the District Court ordered that elections be held pursuant to the eight/three plan cannot be denied (A. 147, 150). The City Council ordinance itself recites that it was passed as a result of the decision of the District Court.

Also revealing is that while this cause was pending before the Court of Appeals, a Charter amendment election was held formally adopting the eight/three plan. This election change was not submitted to the Attorney General for preclearance, nor was a declaratory judgment sought in the United States District Court for the District of Columbia, as would be required by law if this were a state-instituted plan. 42 U.S.C. 1973(c).

The only reasonable explanation for the City not to have submitted the plan to the Attorney General or sought declaratory relief is that petitioners believed that they were exempted from compliance with the Voting Rights Act because the Charter election was merely compliance with the decree of the District Court establishing the eight/three

election system. See *Connor v. Johnson*, 402 U.S. 690 (1971). Indeed, *East Carroll Parish School Board v. Marshall, supra*, makes clear that the preclearance procedures of § 5 of the Voting Rights Act do not apply to a reapportionment scheme submitted and adopted pursuant to court order. 424 U.S. 636, 638 n.6.

Thus a review of the facts reveal that this was not a state-initiated plan but rather one directed and ordered by a District Court exercising its equitable jurisdiction in an adversary proceeding. *East Carroll Parish School Board v. Marshall, supra.*

Petitioners argue, however, that this Court has on several occasions held that when an apportionment plan is held unconstitutional that the legislative body should be given an opportunity to devise a remedy, citing *Reynolds v. Sims*, 377 U.S. 533 at 586 (1964); *Burns v. Richardson*, 384 U.S. 73 at 85 (1966). Respondents insist, however, that reliance on this line of cases is inappropriate.

First, unlike the instant case, none of these cases involve a trial court holding that multi-member districts had unconstitutionally diluted the voting strength of a racial minority. Rather, these cases arose in the context of one man, one vote challenges to the apportionment of a political entity. To the extent that these cases are concerned with multi-member districts at all, it is usually in the context of fashioning an immediate, temporary remedy to avoid election confusion. See *Burns v. Richardson, supra.* Again, multi-member districts have been permitted as a remedy, but only with the stern warning from this Court that they may not be used if they invidiously discriminate against racial minorities. *Burns v. Richardson*, id. at 88.

This Court in *White v. Register*, 412 U.S. 755 (1973) upheld the invalidation of multi-member districts in Dallas

County legislative races and established the evidentiary standards by which invidious discrimination minimizing the voting strength to racial minorities may be ascertained. Significantly, the remedy implemented had no at-large features, and is most recently exemplified by the Tarrant County, Texas portion of said litigation, Supreme Court Docket No. 77-1033, decided February 27, 1978, rehearing denied March 17, 1978. This last order adopted a single-member district remedy proffered by the plaintiffs, even though a state proposed remedy was also before the District Court.

It is certainly reasonable that the federal courts would seek to avoid the political thicket created when called upon to draw district boundary lines for election plans. An excellent discussion of the political implications of reapportionment is found in *Gaffney v. Cummings*, 412 U.S. 735 (1973), which involved what is a good example of a "State-initiated" plan, i.e. a plan created independent of any court order. But even in such a case, this Court felt constrained to warn that there were limits to this exercise of political power, mentioning specifically the vulnerability of multi-member districts if "racial" groups have been fenced out of the political process and their voting strength invidiously minimized." *Gaffney v. Cummings, supra*, 754.

When the District Court afforded the City Council an opportunity to devise a proper election scheme, the Council took it upon itself to go far beyond drawing boundary lines which would, for example, preserve the integrity of political subdivision lines. Rather, in the face of the finding that at-large elections diluted minority voting strength, they presented to the District Court a plan that preserved elements of the very election system that had been found

constitutionally infirm. The City Council is thus seeking to preserve a system already found to be discriminative.

Second, *Reynolds v. Sims, supra*; *Burns v. Richardson, supra*; and *Gaffney v. Cummings, supra*, are cases involving state legislatures which, unlike the City Council, have the unquestioned power to reapportion themselves. As have already been shown, the Charter of the City of Dallas commands the form and procedures of the election of members to the City Council. The Charter may not be amended by an ordinance or resolution passed by the City Council. It can be amended only by a majority vote of the citizens of the City. Art. 1170, TEX. REV. CIV. STAT. ANN.

That what this Court has before it is a court-ordered plan is best shown by comparison with recent cases which concededly involve court-ordered plans.

In *East Carroll Parish School Board v. Marshall, supra*, a white resident of the parish challenged the population disparities between the various wards of the parish. After a hearing, the trial court agreed, and, at the recommendation of the East Carroll police jury (the legislative body of the parish and a defendant) adopted an election plan calling for the at-large election of members of the police jury and the school board. Supra, at 637. Subsequently, after the 1970 census data became available, the District Court instructed the police jury and the school board to file new reapportionment plans. They did so, submitting the at-large plan, *supra.* At this point, Marshall, a black citizen of the parish, was permitted to intervene. Marshall asserted that at-large elections unconstitutionally diluted black voting strength and the Voting Rights Act of 1965. Following a hearing, the District Court approved the

at-large voting arrangement. A panel of the Court of Appeals affirmed, but on rehearing en banc the court reversed, finding the District Court's ruling of no dilution of black voting strength to be clearly erroneous, and requiring single-member districts. This Court granted certiorari and affirmed the judgment of the Court of Appeals, reaffirming the federal common law preference for single-member districts. Clearly, this Court did not consider the at-large plan submitted by the parish police jury and which had been in effect for several elections to be a "State-initiated" plan which exempts the District Court from its duty to order single-member districts to supplant the unconstitutional at-large scheme.

Justice Powell, in granting petitioners' application for stay of the Court of Appeal's judgment and recall of its mandate, cites *East Carroll Parish* as an example of a *court-ordered* plan, as opposed to a *court approved* plan. *Wise v. Lipscomb*, ____ U.S. ____, 54 L.Ed.2d 41, 45, n.2 (1977). In fact, in *East Carroll Parish* the Court uses these terms interchangeably, referring to the multi-member plan "approved" (424 U.S. at 638) and "adopted" (id. at 638, m.6) by the District Court, and describing the action of the District Court as approved (id. at 638, n.4), "adopting" (id. at 639), and "endorsing." (id.) the at-large plan. Regardless of the labels applied, the real issue is whether the plan originated in the course of a constitutional challenge to an existing election system or the plan originated in regular course of business in the appropriate legislative body.

A similar expression of the Court's application of the federal law of voting rights can be seen in the history of *Wallace v. House*, 515 F.2d 619 (5th Cir. 1975), vacated and remanded, 425 U.S. 947 (1976), on remand, 538 F.2d

1138 (5th Cir. 1976), cert. den'd, ___ U.S. ___, ___ L.Ed.2d ___ (1977) 45 U.S.L.W. 3808 (1977). In that case, the trial court determined that an at-large aldermanic election scheme in the City of Ferriday, Louisiana, unconstitutionally diluted the votes of the black citizens of the town. The District Court invited the Board of Aldermen and the plaintiffs to present plans for the Court's consideration. The District Court rejected the Board's plan because it contained a single at-large seat and adopted the plaintiff's plan, which called for all single-member districts. *Wallace v. House*, 515 F.2d 619, at 622. The Court of Appeals reversed, relying on the language in *Reynolds v. Sims*, 377 U.S. 533 at 586 (1964), that legislative apportionment is a matter for legislative determination, and the legislature must be given an opportunity to fashion a remedy. This Court granted certiorari and remanded the case in light of *East Carroll Parish School Board v. Marshall, supra.* On remand, the Court of Appeals found that no special circumstances were present in the record justifying any deviation from the rule of *East Carroll* and affirmed the District Court's all single-member district plan.

By contrast, the parameters of a "state initiated" plan are exemplified by this Court's decision in *Connor v. Waller*, 421 U.S. 656 (1975) requiring a state enacted reapportionment scheme to be submitted for preclearance under §5 of the Voting Rights Act of 1965. In this decision, the governmental body without court order or direction, pursuant to its authority, attempted to legislate an election plan for the State of Mississippi. This Court treated such election scheme as "state initiated," ruling same to be covered by the aforementioned preclearance procedures. As noted

earlier, the decision in *East Carroll* Parish excludes from such submission requirements election plans ordered, adopted, endorsed or approved by courts in the course of litigation.

Surely the instant cause falls squarely within the framework of a court-ordered plan — a plan initiated and ordered by a court exercising its equitable jurisdiction in an adversary proceeding.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT MEXICAN-AMERICANS DID NOT CREATE AN "UNUSUAL CIRCUMSTANCE" SUFFICIENT TO JUSTIFY THE EIGHT/THREE PLAN.

The District Court was aware that in ordering a plan it was abound by the "unusual circumstance" test set forth in *Connor v. Johnson, supra.* (A. 146). The District Court decided that the Mexican-American population could provide the "unusual circumstance" which would justify the three at-large seats. The District Court apparently believed that three at-large seats would provide more electorial access for Mexican-American voters than would single-member districts. Respondents agree with the Court of Appeals that the District Court abused its discretion in making such a finding.

Factually, Mexican-Americans amount to no more than 10 percent of the population of the City. (A. 138). No single-member district could be considered "safe" for a Mexican-

American candidate unless at least twenty districts were created, a suggestion the District Court found "completely void of merit." (A. 137). Although Mexican-Americans were not permitted to intervene during the trial on the merits, the District Court concluded that they "had suffered some restrictions of access to the political processes within the city but that this restriction does not amount to present dilution." (A. 138). The District Court concluded that 1) Mexican-American access would not be improved by exclusive single-member district voting, and 2) Mexican-Americans could work with the dominate slating group to operate in a "swing-vote" manner. For these reasons the District Court held that single-member districts would not increase Mexican-American participation, and that the at-large aspects of the eight/three plan would benefit the Mexican-Americans.

The District Court chose to ignore the testimony of the one Mexican-American who had had experience as a candidate in the context of both at-large and single-member elections — Robert Medrano. Mr. Medrano testified that he had run twice at-large for the Trustee of the Dallas Independent School District. Each time he was defeated. (A. 84). In 1974 he again ran for Trustee, but this time from a newly-created single-member district. The district from which he ran was twenty-one percent Mexican-American and thirty percent black. Mr. Medrano won that election in a run-off with a white opponent. He was not endorsed by any slating group. (A. 85). Obviously this evidence contradicts the District Court's conclusions. In fact, there is no credible evidence in the record that Mexican-American access would not be improved by exclusive single-member district voting.

In April, 1975, the first election under the eight/three plan was held. In a direct test of the District Court's theory of the

Mexican-American's position in the electorial politics of the City of Dallas, the Mexican-American incumbent councilman, Pedro Aguirre, ran against Gary Weber, an Anglo, for one of the three at-large positions. Aguirre was endorsed by the Citizens Charter Association, the powerful and successful slating group. (See A. 126-127). Aguirre was defeated by a substantial majority. (A. 154). Indeed, since the institution of the eight/three plan, no Mexican-American has held a position on the City Council.

Further, as the Court of Appeals pointed out, the Mexican-American intervenors disclaimed the notion that at-large voting allowed greater participation by Mexican-Americans, but rather, citing the defeat of Pedro Aguirre, pointed out that the at-large feature made it "impossible for a Mexican-American to participate meaningfully in the election process." (A. 165).

This Court has found very limited those circumstances which would support the ordering of multi-member districts. In *Mahan v. Howell,* 410 U.S. 315 (1973), this Court was faced with such special circumstance. There, the Virginia General Assembly constructed three single-members districts. However, 36,700 naval personnel "home-ported" at the local naval station situated in that area were arbitrarily assigned to one district, even though it was undisputed that only 8,100 of these personnel actually live aboard vessels located in this district. The rest lived in the surrounding area encompassed by all three districts, although census data was at that time unavailable to show where they lived. It was therefore impossible to draw three single-member districts that were equal in population. Faced with these "unusual, if not unique" circumstances, and confronted with the fact that a delay would seriously disrupt the regularly scheduled

election, this Court found that the District Court did not abuse its discretion in fashioning an interim remedy of combining the three districts into one multi-member district. This Court did, however, repeatedly comment that this case involved a "singular combination of unique factors." *Mahan v. Howell, supra*, at 333. Obviously, the "unusual circumstances" test is a very demanding legal standard.

Petitioners argue that *United Jewish Organizations v. Carey*, ____ U.S. ____, 51 L.Ed.2d 229 (1977) stands for the proposition that the District Court could consider the needs of a second minority group, i.e. Mexican-Americans, in fashioning a remedy, even if there had been no finding of unconstitutional dilution of that minority group's voting rights. Of course, *United Jewish Organization v. Carey, supra*, arose in context of the state-initiated, single-member district reapportionment plan submitted to the United States Attorney General pursuant to §5 of the Voting Rights Act of 1965. Thus, this Court did not have to concern itself with the "unusual circumstance" test. Moreover, only three members of this Court chose to join in a concurring opinion on this Constitutional point, offering no authority for their contention. The issue now before this Court is clearly of a substantially different kind.

There is, then, no credible evidence that the at-large aspects of the plan ordered by the District Court provides any benefit to the Mexican-American citizens of the City of Dallas. Moreover, given the undeniable ambivalence expressed by the District Court as to the access Mexican-Americans have to the political system, it becomes obvious that Mexican-Americans cannot provide the "unusual circumstance" which would justify the eight/three plan.

III.

THE COURT OF APPEALS CORRECTLY HELD THAT THE NEED FOR A CITY-WIDE PERSPECTIVE CANNOT BE AN UNUSUAL CIRCUMSTANCE JUSTIFYING THE USE OF AN AT-LARGE ELECTION SCHEME.

The District Court attempted to justify the three at-large seats on the additional grounds that there was a need for a city-wide perspective on the City Council. It should be noted that the District Court did not find that the need for city-wide representation was an "unusual circumstance" under *Connor v. Johnson, supra.* The District Court simply held that at-large voting had been "an integral part of Texas local governments" (A. 147) and that having some at-large seats would serve the "legitimate governmental interest" of providing a "city-wide view on those matters which concern the city as a whole." (A. 142).

Such conclusions are contrary to the recent holding of this Court in *Connor v. Finch*, 431 U.S. 407 (1977), where the Court noted that

> . . . the practice of multi-member districting contribute to voter confusion, make legislative representatives more remote from their constituents, and tend to submerge electorial minorities and overrepresent electorial minorities. . . , *id.*

This Court, at the same time, discounted the historic preference for a certain election system as an "unusual circumstance," noting that

> [t]he defendants' unalloyed reliance on Mississippi's historic policy against fragmenting counties is unsufficient to overcome the strong preference for single-

> member districting that this Court originally announced in this very case. *Connor v. Johnson,* 402 U.S. 690, 692; *Connor v. Williams,* 404 U.S. 549, 551.

This Court and the Court of Appeals have already addressed this issue in the course of the litigation involving the use of at-large elections in the City of Ferriday, Louisiana. The Court of Appeals initially reversed the District Court, which had ordered a pure single-member plan, and ordered a "mixed" plan containing one at-large seat out of five. Among the reasons cited by the Court of Appeals was that

> . . . at-large representatives will be free from possible ward parochialism and will keep the interests of the entire city in mind as they discharge their duties. While this theory does not always hold true in practice, . . . We cannot say that the rationale is so tenuous that it can be disregarded.
> *Wallace v. House,* 515 F.2d 619, 633 (5th Cir. 1975).

This Court, after granting certiorari, subsequently vacated and remanded the case to the Court of Appeals for consideration in light of *East Carroll Parish Police Jury v. Marshall, supra.* See *Wallace v. House,* 425 U.S. 947 (1976). On remand, the Court of Appeals conceded that the case presented no "special circumstance" that would override the general preference for single-member districting. *Wallace v. House,* 538 F.2d 1138, 1146 (5th Cir. 1976). Cert. den'd, ____ U.S. ____ , 45 U.S.L.W. 3808 (1977).

It must be pointed out that when the District Court initially found that the challenged at-large election scheme restricted the access of black citizens to the political process, it did so on the basis of lengthy evidence of the discriminatory aspects of life and politics experienced by black citizens in Dallas. The District Court specifically found that black voters tend

to vote for black candidates and white voters for white candidates. This being so, a "city-wide perspective" becomes an euphemism for reserving three seats of the City Council for the use and benefit of white majority. This is surely not the "unusual circumstance" contemplated in *East Carroll Parish Police Jury, supra.*

CONCLUSION

Respondents pray that the judgment of the Court of Appeals be affirmed.

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